SUPREME COURT, U.S.
FILED
97 1589 MAR 23 1998
OFFICE OF THE CLERK

No. 98-__

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ERNST & YOUNG, a Canadian Partnership of Chartered Accountants, *Petitioner,*

vs.

THE COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN, *Respondent.*

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Michigan

PETITION FOR A WRIT OF CERTIORARI

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March 23, 1998

MERRILL CORPORATION, (404) 237-0038

100 pp

QUESTION PRESENTED

Where a professional partnership of Canadian chartered accountants, not certified to practice accounting in the United States and having no direct contacts with Michigan, reports on the financial statements of a Canadian insurance company in Canada pursuant to Canadian accounting and auditing standards, does the Canadian accounting firm's knowledge that its multinational corporate client does business in the United States and may send the accounting firm's audit opinion into Michigan for review by regulators and/or policyholders satisfy the constitutional minimum contacts standard for personal jurisdiction over the accounting firm by a Michigan court?

LIST OF PARTIES

The following are co-defendants with Ernst & Young, chartered accountants, in the action now pending in the trial court, the Circuit Court of Ingham County, Michigan. These parties to the proceedings below were not parties to the Appeal and therefore are not named in the caption to this Petition.

George R. Albino
William H. Alexander
John D. Allan
William G. Benton
Bennett A. Brown
Patrick D. Burns
Paul G.S. Cantor
William D. Douglas
Mark E. Edwards
Kenneth E. Field
Nan-B de Gaspe Beaubien
Irving R. Gerstein
Anthony F. Griffiths
Sir Anthony S. Jolliffe
George E. Mara
Robert W. Martin
David R. McCamus
Daryl E. McLean
Andre Monast
Michael D. Regester
John A. Rhind
Michael Rosenfelder
Borden D. Rosiak
Michael J. White
Adam H. Zimmerman
Harris Trust and Savings Bank
Ernst & Young LLP
Ernst & Young International

Confederation Treasury Services, Ltd., a subsidiary of Confederation Life Insurance Company, has been added to the proceedings below as a third-party defendant.

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No. 98-__

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

ERNST & YOUNG, a Canadian Partnership
of Chartered Accountants, *Petitioner*,

v.

THE COMMISSIONER OF INSURANCE
OF THE STATE OF MICHIGAN, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE STATE OF MICHIGAN

Ernst & Young, a Canadian partnership of chartered accountants ("E&Y-Canada"), respectfully petitions for a writ of certiorari to review the judgment below of the Court of Appeals for the State of Michigan.

OPINIONS BELOW

The order of the Michigan Supreme Court denying E&Y-Canada's Application for Leave to Appeal is reported *sub nom. Commissioner of Insurance of the State of Michigan v. Albino, et al.*, 456 Mich. 905, 572 N.W.2d 13 (1997), and reproduced

in Appendix D, *infra*. The opinion of the Michigan Court of Appeals is reported *sub nom. Commissioner of Insurance of the State of Michigan v. Albino, et al.*, 225 Mich. App. 547, 572 N.W.2d 21 (1997), and reproduced in Appendix C, *infra*.

JURISDICTION

The judgment of the Court of Appeals of Michigan was entered on September 30, 1997. On December 23, 1997, the Supreme Court of Michigan entered an order denying E&Y-Canada's Application for Leave to Appeal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The provision of the United States Constitution involved is the Due Process Clause of the Fourteenth Amendment:

Section 1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

This case raises an issue affecting all professionals, including accountants, lawyers, doctors and architects, who provide opinions or otherwise perform intangible services for clients. That issue, on which the circuits are split, is whether a court may exercise personal jurisdiction over a professional when the professional's only contact with the forum was its knowledge that work performed by it for a client in its home jurisdiction might be communicated to persons in that forum.

On this issue, some lower courts have concluded that foreseeability that a professional's opinion or advice may be used in other jurisdictions is not alone sufficient to support personal jurisdiction. *See* pages 16-21, *infra*. Other circuit courts, and the Michigan Court of Appeals in this case, have held that foreseeability to the professional that its client may use its opinion and that the opinion may be relied upon by third parties in a foreign forum is alone sufficient to subject the professional to jurisdiction in that forum. *See* pages 21-22, *infra*. Under those holdings, a professional firm could be haled into court in any state where, foreseeably, its opinion or advice might be used, despite that professional firm's having no direct contacts with the forum.

Particularly given the dramatic expansion of commerce between the United States and countries around the world, this issue is of paramount interest to all accountants, lawyers and other professionals who render advice that may be used by clients having relationships with many states and countries.

Here, Petitioner E&Y-Canada does not dispute that it knew that the opinions it delivered to its Canadian client in Canada would be included in its client's annual reports and could be sent by the client to Michigan and many other states and countries where the client's policyholders resided. At the same time, it is established that E&Y-Canada had no other contacts in or with the State of Michigan.

A. The Underlying Claims

This lawsuit stems from the August 1994 seizure of the business of Confederation Life Insurance Company ("CLIC"), a mutual insurance company organized under the laws of Canada, with its principal office in Toronto, Ontario, Canada.

The Court below described the seizure as "the largest insurance company insolvency in North American history." 225 Mich. App. at 550 (App. C-2).

Formerly one of the largest insurance companies in Canada, CLIC did business, either directly or through its subsidiaries, in Canada, the United States, and the United Kingdom. Its U.S. headquarters were in Atlanta, Georgia; as is the practice for many Canadian life insurers, its "port of entry"[1] into the United States was Michigan although its headquarters were not located there.

In August 1994, the Superintendent of Financial Institutions Canada, CLIC's primary regulator, took control of the assets of CLIC pursuant to the Canadian Insurance Companies Act. Respondent Commissioner of Insurance for the State of Michigan, Plaintiff below, took control of the U.S. assets of CLIC pursuant to an order of rehabilitation entered by the Ingham County Circuit Court, Michigan, on August 12, 1994. Respondent is also pursuing claims against CTSL, a CLIC subsidiary, in Ontario. CLIC's total company liquidation is proceeding in Ontario, while liquidation proceedings as to CLIC's United States assets are ongoing in Michigan.

In June 1995, Respondent brought this lawsuit in Ingham County Circuit Court, Michigan, in his capacity as Rehabilitator

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[1] Every foreign insurer wishing to do business in the United States must select a "port of entry," which determines which of the 50 state insurance commissioners will have primary responsibility for monitoring the company's financial solvency in the United States. An insurer's port of entry is not determined by where it writes the most business or where its U.S. headquarters are located.

of the U.S. assets of CLIC,[2] asserting common law theories of contract and tort against numerous defendants, including former officers and directors of CLIC and an Illinois bank in which CLIC deposited assets pursuant to a requirement of Michigan law.

The Canadian partnership of chartered accountants[3] practicing under the name "Ernst & Young" ("E&Y-Canada") was also named as a defendant, as was Ernst & Young LLP, a separate and independent U.S. partnership operating under the Ernst & Young name throughout the United States.[4] Pursuant to the Insurance Companies Act of Canada, CLIC had engaged E&Y-Canada to audit CLIC's consolidated financial statements[5] for the years 1991, 1992, and 1993. To the extent accounting work was performed in the United States, it was performed by Ernst & Young LLP, not E&Y-Canada.

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[2] Respondent purports to assert his claims on behalf of what he styles the "U.S. Branch" of CLIC (its assets and liabilities in the United States), the U.S. policyholders of CLIC, and the Michigan Insurance Bureau.

[3] In Canada, licensed public accountants are referred to as "chartered accountants," whereas in the United States, they are referred to as "certified public accountants."

[4] E&Y-Canada is an entirely separate and independent legal entity from the Ernst & Young firm in the United States, which is also named as a defendant in this lawsuit. E&Y-Canada and Ernst & Young LLP in the United States do not share partners, employees, revenues, or business records. While each is authorized to use the "Ernst & Young" name, neither firm controls or supervises the actions of the other.

[5] "Consolidated" financial statements cover the financial condition of a company taken as a whole and do not reflect separately a company's business in a particular country or as to a particular subsidiary or branch.

Respondent claims that E&Y-Canada's audit reports and CLIC's financial statements failed to disclose material facts and seeks to hold E&Y-Canada liable in Michigan for damages allegedly exceeding $600 million, on common law theories of professional negligence, fraud, breach of contract, and negligent misrepresentation.

B. How the Jurisdictional Question Was Raised

E&Y-Canada filed a motion for summary disposition for lack of personal jurisdiction in the Ingham County Circuit Court, on the grounds that Michigan's exercise of personal jurisdiction over E&Y-Canada would violate Michigan's long-arm statute and would offend the limitations on Michigan's jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment. The trial court denied the motion. Appendices A, B.

E&Y-Canada then sought and obtained leave to appeal the trial court's order to the Court of Appeals for the State of Michigan, again on the grounds that the exercise of personal jurisdiction over E&Y-Canada in Michigan violated due process. The Court of Appeals issued a 2-to-1 opinion affirming the trial court's exercise of personal jurisdiction over E&Y-Canada. Appendix C.

E&Y-Canada then sought leave to appeal the Court of Appeals' decision to the Supreme Court for the State of Michigan, based upon due process grounds. The Michigan Supreme Court entered an order denying E&Y-Canada leave to appeal, stating, "[W]e are not persuaded that the questions presented should be reviewed by this Court." Appendix D-2.

C. Statement of Material Facts

1. E&Y-Canada's Engagements with CLIC Were in Canada.

The Michigan Court of Appeals' majority opinion acknowledged several critical facts. E&Y-Canada is a partnership of Canadian chartered accountants headquartered in Toronto. E&Y-Canada has never done business in Michigan, has no employees or property in Michigan, and has provided no auditing or accounting services in Michigan; E&Y-Canada has no physical presence in Michigan. CLIC engaged E&Y-Canada in Canada to render professional accounting and auditing services in Canada; E&Y-Canada was paid for the professional services by CLIC in Canada. 225 Mich. App. at 552, 556 (App. C-5, C-9).

The record additionally reflects that E&Y-Canada's engagements with CLIC were initiated by CLIC from its headquarters in Toronto, Ontario, Canada. The terms of those engagements were negotiated and agreed to in Toronto. E&Y-Canada supervised the CLIC engagements from Toronto, pursuant to Canadian accounting rules and auditing standards; the CLIC audit engagements were performed at CLIC's offices located in Ontario, Canada. To the extent certain audit procedures needed to be performed at CLIC's offices in Atlanta, Georgia, and London and Luton, England, E&Y-Canada contracted with separate firms practicing under the name of "Ernst & Young" in the United States and the United Kingdom respectively to perform those distinct and separate procedures in their respective countries. No accounting or audit service was performed in Michigan or by Michigan residents for CLIC or any of its subsidiaries. All payments for services rendered by E&Y-Canada in connection with the CLIC audits were paid

by CLIC in Canadian currency, and were received by E&Y-Canada in Canada.

The following facts are similarly not in dispute. E&Y-Canada issued its audit reports on the consolidated financial statements of CLIC from its main offices in Toronto, and did so pursuant to Canadian generally accepted accounting principles, as articulated by the Canadian Institute of Chartered Accountants, and pursuant to the requirements of CLIC's primary regulator, the Office of the Superintendent of Financial Institutions Canada ("OSFI"). E&Y-Canada did not send CLIC's consolidated financial statements or its audit reports to the Michigan Insurance Bureau or to anyone in Michigan. Rather, CLIC incorporated E&Y-Canada's audit report delivered in Canada into its annual report, which CLIC then sent to its agents and others in Canada, the United States, and the United Kingdom. To the extent that Michigan regulators had any contact with E&Y-Canada, it came only when the Michigan regulators traveled to Canada to review workpapers.

2. *E&Y-Canada Is Subject to Professional Requirements and Regulations Limiting the Geographic Scope of its Practice.*

The absence of contacts between E&Y-Canada and Michigan is entirely consistent with professional licensing requirements and other regulations of the accounting professions in both Canada and Michigan. Canada has its own set of licensing and auditing standards that differ from the generally accepted auditing standards applicable to certified public accountants in the United States. Michigan law prohibits Canadian chartered accounting firms from practicing accountancy in Michigan unless they are certified to do so by Michigan. Mich. Comp. Laws § 339.702(2). Michigan law

permits only certified public accountants to be partners of public accounting firms practicing in Michigan, *id.* § 339.705; similarly, Canadian professional rules require that only chartered accountants be partners of Canadian public accounting firms. *See* Rule 405 of the Rules of Professional Conduct of the Institute of Chartered Accountants of Ontario.

These professional requirements restrict E&Y-Canada's practice of accountancy to Canada. E&Y-Canada is not certified by Michigan to practice public accounting in Michigan. E&Y-Canada has no partners or employees in Michigan; it has no registered agent for service of process in Michigan; owns no property, real or personal, in Michigan; and maintains no offices, books, records or bank accounts in Michigan.

3. The Court of Appeals' Decision

The Michigan Court of Appeals, by a 2-to-1 majority, held that, despite E&Y-Canada's lack of direct contacts with Michigan, E&Y-Canada had purposefully established minimum contacts with Michigan sufficient to justify the exercise of personal jurisdiction in Michigan. The Court concluded that such a finding was appropriate because (1) E&Y-Canada had rendered professional accounting services to a multinational company that, while a Canadian insurer, was also deemed under a Michigan legal fiction to be a Michigan domiciliary, and (2) the evidence showed that E&Y-Canada foresaw that CLIC's annual reports, including E&Y-Canada's audit opinions, would be sent by the client to Michigan as part of its client's regulatory filings and would be relied upon by Michigan regulators and policyholders. 225 Mich. App. at 562 (App. C-16). The Court of Appeals majority analogized the professional's opinion to a SCUD missile being fired into

Michigan, and concluded that a Canadian chartered accountant could be haled into a Michigan court just as a party who fired such a missile. *Id.* (App. C-15-16).

In support of its conclusion that there were sufficient minimum contacts to support personal jurisdiction, the Court of Appeals majority relied upon two documents, an "awareness letter"[6] and an audit engagement overview, as evidence that E&Y-Canada knew that its audit reports would be sent by CLIC to Michigan for use by regulators and policyholders. The text of those same documents, however, underscores the fact that E&Y-Canada was performing audits exclusively under Canadian law and accounting rules.

The Audit Engagement Overview, an audit planning document, stated:

> In accepting the audit engagement of Confederation Life Insurance Company (the "Company") we assume a responsibility to the policyholders and directors of the Company, *and the Superintendent of Financial Institutions* [of Canada] to report on the financial statements of the Company and its subsidiaries. *Our primary objective in fulfilling this responsibility is to discharge our statutory obligation under The Insurance Companies Act* [of Canada] (the "Act") which requires us to perform an audit in accordance with

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[6] Michigan law requires that the insurers submit a letter from their accountants stating that the accountants are aware of applicable Michigan law. Mich. Comp. Laws § 500.1009. An exception is made, however, for Canadian insurers like CLIC, whose "awareness letter" is required to state that the accountant is aware of *Canadian*, not Michigan, law. *Id.* § 500.1025(2).

> the [Canadian] generally accepted auditing standards and issue an audit opinion to the policyholders and directors of the Company.

225 Mich. App. at 553-54 (App. C-6 (emphasis added)).

The "awareness letter," provided to CLIC by E&Y-Canada in Toronto and then forwarded by CLIC to the Michigan Insurance Bureau, stated in relevant part:

> We are independent with respect to the Company *and conform to the professional standards as contained in the Rules of Professional Conduct of the Institute of Chartered Accountants of Ontario.*
>
> . . . .
>
> *We are aware of the provisions in the Insurance Companies Act [of Canada] and the rules and regulations of the Office of the Superintendent of Financial Institutions* [of Canada] that relate to accounting and financial matters.
>
> On completion of our audit, we will express our opinion as to the fair presentation, in all material respects, of the financial statements of the Company in accordance with generally accepted accounting principles, *including the requirements of the Superintendent of Financial Institution[s] in Canada.*
>
> We will retain workpapers prepared in the conduct of our audit . . . *and, on instructions from the*

> *Company, will make them available for review by the Michigan Department of Insurance.*
>
> This letter is furnished solely for *you* [CLIC] to comply with Section 1009(2) of the Michigan Insurance Code and should be used for no other purpose.

Plaintiff's Response to Defendant Ernst & Young-Canada's Motion for Summary Disposition for Lack of Personal Jurisdiction, Exhibit I (emphasis added).

REASONS FOR GRANTING THE PETITION

At least eight federal courts of appeals have had the opportunity to consider the nature of the contacts necessary to subject a nonresident professional to jurisdiction in a forum where the professional's client, but not the professional, does business. These courts have applied irreconcilably different interpretations of the law and the facts in the cases before them, and a significant conflict has developed. Some of the decisions, including the decision of the court below, have included reasoning at odds with that prescribed by this Court in other contexts.

These conflicting decisions have created for professionals substantial uncertainty as to when they will and will not be subject to suit in a particular forum. Especially given the now-customary reach of client businesses to multiple jurisdictions, nonresident professionals should not face such conflicting determinations as to whether their clients' multi-state or multinational activities will or will not subject them to jurisdiction in a range of states or countries where the

professionals otherwise neither do business nor seek to do business. The Court should resolve the issue in order to reestablish predictability in jurisdictional determinations as to professionals and professional firms, and to ensure that defendants identically situated will not be treated differently based solely upon the particular forum seeking to exercise jurisdiction.

A. The Analysis of the Michigan Court of Appeals is in Conflict with this Court's Precedent.

More than half a century ago, the rigid jurisdictional requirements of *Pennoyer v. Neff*, 95 U.S. 714 (1878), gave way to the more flexible "minimum contacts" standard of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). But, in the cases following *International Shoe*, this Court has repeatedly cautioned that a more flexible jurisdictional standard does not eliminate fundamental constitutional restrictions on the assertion of jurisdiction. "Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

As a prerequisite to jurisdiction, this Court has explained that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253. The minimum contacts standard "protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*

Corp. v. Woodson, 444 U.S. 286, 292 (1980). This Court has "never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." *Id.* at 293.

The decision below and the similar decisions of various circuit courts are, we submit, inconsistent with those fundamental limiting principles as to personal jurisdiction. Among other things, inconsistent with the holding of the court below, this Court has held in a products liability context that foreseeability that a product could find its way through the stream of commerce to a forum is not sufficient for personal jurisdiction under the Due Process Clause. *Id.* at 295. As the plurality said in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987):

> The "substantial connection" between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. . . . [A] defendant's *awareness* that the stream of commerce may *or will* sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Id. at 112 (citations omitted) (emphasis added).

Also inconsistent with the analysis of the court below are *Burger King, Asahi* and *World-Wide Volkswagen*, where this

Court held that in determining whether a nonresident defendant has purposefully availed itself of the forum, only the defendant's own conduct and connections with the forum, not those of a third party, may be considered. *E.g., Asahi*, 480 U.S. at 112 ("[t]he 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant") (citation omitted); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) ("a defendant will not be haled into a jurisdiction solely as a result of . . . the 'unilateral activity of another party or a third person'") (citations omitted); *Hanson*, 357 U.S. at 253 (the "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State") (quoted in *World-Wide Volkswagen*, 444 U.S. at 298). The purpose of having such a requirement is to establish a degree of predictability to the analysis "that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

Although the Court's prior decisions thus indicate that in the context of professionals and professional firms it would likely reject decisions such as that below, it has never addressed the growing controversy over the extent to which professionals may be subject to jurisdiction in multiple locales where their opinions, or the benefit of their services, may foreseeably be directed by their clients.

B. The Decision of the Michigan Court of Appeals Represents One Side of a Split Between the Federal Courts of Appeals.

1. Federal Courts of Appeals Declining to Exercise Jurisdiction Over Nonresident Professionals Rendering Professional Services Outside the Forum.

a. The Second Circuit

In *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), a securities fraud claim was filed in New York against a British accounting firm; the firm had audited financial statements of a British corporation that were incorporated into a draft annual report given to prospective purchasers of the corporation, who were residents of New York, but the firm had done nothing in the United States giving rise to the lawsuit. Anticipating *Asahi*, the court there stated that the exercise of jurisdiction over a defendant based upon acts outside the forum causing effects within the forum "must be applied with caution, particularly in an international context." *Id.* at 1341. Even accepting as true the plaintiff's assertions that the accounting firm must have known that its reports would be relied upon by any prospective purchasers, the court found the exercise of personal jurisdiction over the British accounting firm in New York to be inconsistent with due process:

> On that basis accountants operating solely in London could be subjected to personal jurisdiction in any country whose citizen had purchased stock of a company they had audited; the same would be true, of course, of accountants operating solely in the United States. Although such worldwide reliance may be, in a sense, foreseeable, it is not sufficiently

> so to constitute a basis of personal jurisdiction consonant with due process.

Id. at 1342. The court further pointed out that the foreseeability test for liability in tort should be distinguished from the test for personal jurisdiction, *id.* at 1341 & n.11, and that "the commercial loss suffered by a business from acts committed elsewhere is itself fortuitous, since the place of impact is ruled by the injured party's choice of place of doing business rather than the locus of activity directly traceable to the defendant." *Id.* at 1342 n.11. *See also Mayes v. Leipziger*, 674 F.2d 178, 185 (2d Cir. 1982) (based on long-arm statute, California law firm representing New York resident in California lawsuit was not subject to personal jurisdiction in New York).

The decision of the Second Circuit is squarely in conflict with that of the Michigan Court of Appeals.

b. The Eighth Circuit

In *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993), the Eighth Circuit declined to permit the exercise of personal jurisdiction in Minnesota over the Canadian partnerships of Peat Marwick and Deloitte & Touche. The plaintiff had alleged that these Canadian accounting firms had intentionally transmitted false financial reports concerning a Canadian company into the United States, knowing that such reports would be filed with the Securities and Exchange Commission and relied upon by investors in the United States. The plaintiff contended that the purposeful direction of even one false statement into Minnesota was sufficient to support jurisdiction there for claims arising out of that conduct. The Eighth Circuit rejected this argument:

> Like Touche Canada, Peat Marwick performed its audit work in Canada under Canadian accounting principles and auditing standards for its Canadian client. . . . Peat Marwick did nothing to "purposefully avail" itself of the privilege of conducting activities within Minnesota.

Id. at 1388. The Eighth Circuit has likewise declined to hold nonresident lawyers subject to suit in the forum on the grounds that they had represented forum residents. *Austad Co. v. Pennie & Edmonds*, 823 F.2d 223 (8th Cir. 1987) (New York law firm representing South Dakota client in litigation in Maryland was not subject to suit in South Dakota).

These cases also conflict with the decision below.

c. The Fourth Circuit

Similarly in conflict with the Michigan Court of Appeals is *Young v. FDIC*, 103 F.3d 1180 (4th Cir. 1997), in which a prospective investor sought to finance the purchase of $600 million in oil and gas reserves through a company he believed to be financially sound based upon financial statements audited by Price Waterhouse-Bahamas stating that the company had a substantial deposit with a South Carolina bank. The Bahamian accounting firm, although part of a worldwide organization of separate and independent Price Waterhouse accounting firms, was organized in the Bahamas and had its principal place of business there. It had no offices, agents, employees, or property in South Carolina and had not engaged in any business there. The Bahamian accounting firm had sent an asset confirmation letter directly to the South Carolina bank holding the company's sole asset, but the firm's audit had taken place entirely in the Bahamas. The court held, "[T]he sole act of

using account information from [a bank] in South Carolina does not establish a 'substantial connection' between PW-Bahamas and South Carolina; nor does it constitute a purposeful availment of the privilege of conducting business in South Carolina." *Id.* at 1191 (citing *Burger King*, 471 U.S. at 475). The court similarly rejected the plaintiff's contention that Price Waterhouse-Bahamas should be subject to personal jurisdiction in South Carolina based on the foreseeability that investors would rely on its audit opinion, stating, "the Supreme Court clearly has held that 'foreseeability' alone is not 'a sufficient benchmark for personal jurisdiction under the Due Process Clause.'" *Id.* at 1192 (quoting *World-Wide Volkswagen*, 444 U.S. at 295).

d. The Sixth Circuit

The Sixth Circuit has also declined to exercise personal jurisdiction over nonresident professionals whose services rendered elsewhere had an effect on forum residents. In *Hatem v. Ark Oil Group, Ltd.*, No. 91-2251, 1993 U.S. App. LEXIS 23191 (6th Cir. Sept. 8, 1993), a Michigan resident entered into a partnership agreement with a Louisiana resident. The Louisiana resident's law firm, located solely in Louisiana and not licensed to practice law in Michigan, drafted a formal partnership agreement under Louisiana law and engaged in correspondence and telephone calls with the plaintiff in Michigan in the course of that representation. The court found that the Michigan resident's attempt to exercise jurisdiction over these Louisiana lawyers in Michigan would violate due process: "Appellees at no time availed themselves of the advantages of doing business in Michigan, as construed under the law. Their contacts with Michigan were purely incidental. They were Louisiana lawyers working for a local (Louisiana) client, and they were at most mailing or telephoning to

Michigan because that is where the investor was." *Id.* at *8. Consistent with this decision is another decision of the Sixth Circuit, declining to exercise jurisdiction over a Canadian doctor on long-arm statute grounds. *Rann v. McInnis*, 789 F.2d 374 (6th Cir. 1986) (Ontario physician who treated Michigan patient in Ontario held not subject to suit in Michigan).

e. The First Circuit

The Michigan Court of Appeals' decision also conflicts with the holding of the First Circuit Court of Appeals in *Sawtelle v. Farrell*, 70 F.3d 1381 (1st Cir. 1995). In *Sawtelle*, New Hampshire residents brought legal malpractice actions against their Florida and Virginia law firms and attorneys for inadequate settlement of a wrongful death action in Florida. Even though the defendants had knowingly rendered legal services to New Hampshire residents and allegedly directed negligent legal advice to their clients in New Hampshire, causing their clients' reliance and economic loss in New Hampshire, the court held that the defendants had not purposefully availed themselves of the New Hampshire forum and could not have reasonably foreseen that they could be held subject to suit there. "The mere act of agreeing to represent (and then representing) an out-of-state client, without more, does not suffice to demonstrate voluntary purposeful availment of the benefits and protections of the laws of the client's home state." *Id.* at 1394. The attorneys' legal services had been rendered elsewhere, and their only contact with the forum consisted of communications "with the clients in the state where they happened to live." *Id.* at 1391. The court was similarly unimpressed with the plaintiffs' argument that the attorneys and law firms, by cultivating their image on a national scale, had subjected themselves to suit in New Hampshire, considering this argument a variant on the "stream of

commerce" theory rejected by this Court in *Asahi*. *Id.* at 1393. *See also Kowalski v. Doherty, Wallace, Pillsbury & Murphy*, 787 F.2d 7 (1st Cir. 1986) (based on long-arm statute, Massachusetts law firm representing New Hampshire client not subject to suit in New Hampshire).

2. Federal Courts of Appeals Exercising Jurisdiction Over Nonresident Professionals Rendering Professional Services Outside the Forum.

Other courts, however, have followed the same school of thought adopted by the Michigan Court of Appeals, construing the law and facts to conclude that a nonresident professional's relationship with a forum resident of itself generates sufficient contacts to support the exercise of personal jurisdiction consistent with due process.

a. The Ninth Circuit

In *Hylwa v. Palka*, 823 F.2d 310 (9th Cir. 1987), the Ninth Circuit held that a Kansas accountant was subject to suit in California, even though the accountant's contacts with the forum state were the product of his client's unilateral decision to move there from Kansas. The court determined that because the accountant made annual trips to California in connection with his engagement and continued to benefit from ongoing performance of accounting services for his client after it relocated to California, the accountant should have reasonably anticipated being haled into a California court for claims arising from the services he performed for his client in Kansas. *Id.* at 314-15.

b. The Eleventh Circuit

Similarly, in *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253 (11th Cir. 1996), the court subjected Michigan attorneys and accountants to personal jurisdiction in Florida on the grounds that the defendants had rendered estate planning services to a Florida resident with specific reference to Florida law, knowing that the client's will would be probated in Florida, and directed mail and telephone correspondence to the client in Florida. The court held, "[t]he nature of the professional services rendered in this case was such that the defendants were fully aware that their actions or omissions would have a substantial effect in Florida. They should have reasonably anticipated the possibility of a suit arising from conduct directed towards the Florida Decedent." *Id.* at 259.

c. The Fifth Circuit

In addition, the Fifth Circuit exercised personal jurisdiction over a California doctor who had no contacts with Texas other than to have provided experimental drugs to a Texas patient that allegedly caused injury to the patient in Texas. *Bullion v. Gillespie*, 895 F.2d 213 (5th Cir. 1990). Those facts, combined with the presumed compensation for her services out of Texas and the presumed mail and telephone contact with the patient in Texas, made the exercise of personal jurisdiction over the California doctor in Texas both fair and reasonable. *Id.* at 217.

C. The Question Is Important and Should Be Settled.

This Court has always regarded with great seriousness the exercise of personal jurisdiction by a state over those who are neither residents nor citizens of it. *Asahi*, 480 U.S. at 114-15

("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in stretching the long arm of personal jurisdiction over national borders. . . . 'Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field'"). The importance of enforcing the Due Process Clause takes on added importance in politically or emotionally charged cases in which claimed damages are high. It is in just such circumstances that the protections afforded by the Due Process Clause must be most vigilantly enforced, as it is in those circumstances that the protections are most at risk.

These values are significant, but they are not the only impact of the Michigan Court of Appeals' ruling. As a practical matter, under the sweep of this decision and the other decisions like it, a professional firm may carefully structure its affairs so as to remain exclusively within one jurisdiction or, in this instance, one country, but the simple act of performing professional services for a multinational corporation will subject that same professional firm to suit anywhere the multinational corporation does business, regardless of the precautions the professional has otherwise taken to limit its jurisdictional exposure. Under this decision, a professional in effect appoints each of its clients its agent for service of process, wherever the client might be, and regardless of the professional's own conduct apart from accepting the client in the first place.

If E&Y-Canada were a manufacturer, and if this case were a products liability suit, the Michigan Court of Appeals could not have ruled as it did, because the conflict with this Court's rulings would have been direct and clear. What E&Y-Canada sells, however, is intangible. It sells a service. It is governed by laws, regulations and rules that limit the geographic scope of

its practice, but the clients it serves are not so constrained. As a result, E&Y-Canada performs services for its clients in Canada, but the effects of its services potentially may be felt wherever its clients happen to do business. No matter what efforts professionals may undertake to limit the geographic scope of their practice, under the reasoning of the Michigan Court of Appeals and the other federal circuits espousing that view, the only way an accounting firm can avoid being held subject to suit where its client wishes to do business is to refuse to render services to that client -- a result contrary to the public policy of Michigan and indeed of the United States generally.

While the principles articulated in *Hanson*, *World-Wide Volkswagen*, *Burger King*, and *Asahi* should be instructive of the proper analysis to use when evaluating whether to assert jurisdiction over nonresident professionals, this Court has never directly addressed the issue of how nonresident professionals fare in this increasingly service-oriented economy, in which technology has made interstate and even multinational commerce a routine occurrence. This case and the others cited involving accountants, doctors, and lawyers indicate the frequency with which this issue arises, as well as the confusion and divergence of opinion to be found in the courts faced with resolving it. It is highly important for professionals to know, with some degree of certainty, what conduct on their part will and will not subject them to personal jurisdiction in states where they have not rendered services but where it can be argued that their services may foreseeably have an effect.

CONCLUSION

For the foregoing reasons, E&Y-Canada respectfully requests that the Court grant a writ of certiorari to review the decision of the Michigan Court of Appeals.

Respectfully submitted,

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March 23, 1998